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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 205.

HAROLD CROWLEY, PLAINTIFF IN ERROR,

vs.

UNITED STATES.

BRIEF FOR THE PLAINTIFF IN ERROR ON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant was indicted at the April term, 1901, of the United States district court for Porto Rico, held at San Juan, for violation of section 5467 of the United States Revised Statutes, relating to the postal laws.

He was tried at Ponce, Porto Rico, in May, 1901, convicted, and sentenced to four (4) years imprisonment at hard labor.

He took an appeal to and also sued out a writ of error to this court from such indictment, trial, conviction, and sentence, and the case is now here on such appeal and writ of error.

The writ of error is the proceeding relied on, the return being in substance the same in each proceeding.

The questions involved and the manner in which they are raised are as follows:

The Grand Jury.

First.

The defendant filed a plea in abatement to the indictment, setting forth that the grand jury which presented the indictment was illegally drawn and impaneled, and that it contained persons disqualified from being grand jurors in said court. That one was an alien and not a citizen of the United States or of Porto Rico; one not a resident of the island for one year; that seven of them were not assessed on the last assessment-roll of any district in Porto Rico on $200 of property belonging to him; that four of them named therein were not drawn from the box containing at the time of drawing the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the United States Revised Statutes, and which names had not been placed therein by the clerk of said court and a jury commissioner, as prescribed by act of Congress of June 30, 1879; that no writs of *venire facias* were directed by said clerk against said four persons, as prescribed by section 803 of the United States Revised Statutes; that the defendant was not present in court when said jury was impaneled; that he would be prejudiced by such improper impaneling of said jury, and prays judgment that the indictment be dismissed and quashed (Case, pages 3, 4, 5).

The United States attorney demurred to said plea. For the demurrer and grounds thereof see Case, page 67. The judge sustained the demurrer (Case, page 7).

THE INDICTMENT.

Second.

The defendant then demurred to the indictment and each count thereof.

For such demurrer and the grounds thereof see Case, page 8.

The judge overruled the demurrer (Case, page 8).

Third.

The defendant then pleaded "not guilty" (Case, page 7).

PLEA TO JURISDICTION.

Fourth.

When defendant's case was moved for trial at Ponce, May 17, 1901, he filed a plea to the jurisdiction of the court.

The United States attorney demurred to such plea.

The judge sustained the demurrer.

As to plea, demurrer, etc., see Case, page 9.

The defendant then moved the court to compel the United States attorney to elect upon which count of the indictment he would prosecute to trial.

The judge refused to do so (Case, page 9).

THE TRIAL.

Fifth.

Upon the trial the following questions arose, which the defendant claims were erroneously ruled and held against him, and are such errors that this court should set aside his conviction:

A. The evidence of Postmaster Delgado, of Yauco to the following question of the United States attorney:

"Question. On or about the 24th day of March last, state what, if any, registered packages containing money were forwarded from Yauco post-office?"

This was objected to by defendant, the objection overruled, and the witness testified concerning same (Case, pages 22 to 28).

B. The evidence of the witness Hutton was received by the court under defendant's objection.

The part excepted to commences with the question:

"Question. How did you happen to turn that money over to those gentlemen (McLeod and Landis)?" (Found on page 55 of Case, and extends to page 58.)

C. The evidence of the witness McLeod was objected to by defendant, and commences on page 59 of Case, from the beginning of his evidence, and down to bottom of page 60.

D. The evidence of the witness Landis was objected to by the defendant, commencing with the assertion of the United States attorney:

"DISTRICT ATTORNEY: I will introduce into evidence first the package entire and then the contents" (Case, page 62, and ending with his direct examination on that page).

E. The United States, at the close of Landis' evidence, rested, and the defendant then and there moved for a direction of a verdict of "not guilty."

The judge denied the motion.

The grounds of the motion were:

"Mr. CROWLEY: May it please the court, I ask the court now, at the close of the Government's case, to direct a verdict of 'not guilty' upon the following grounds:

First. That the indictment, in each and every one of its three counts is defective, upon the ground that it does not

allege, in any one of the three counts, that a letter or package or contents of a letter or package were placed in a post-office of the United States at any place or at any time.

Second. In no one of the counts is it alleged that this property, this letter or package or contents of letter or package, came into the mails of the United States at any particular place or at any particular time.

Third. The indictment does not, by name, specify the postmaster to whom the letter or package was addressed. It simply alleges that it was intended to be conveyed by mail to the postmaster at San Juan.

Fourth. There is no evidence of the existence of the national banks or that any of the bank notes were issued by any national bank.

Fifth. There is no evidence in the case that this letter or package was not delivered to the postmaster at San Juan, as charged in the indictment.

Sixth. There is a variance between the indictment and the proof.

Seventh. The court is without jurisdiction, there being no law for a term of this court commencing May 13, 1901, at Ponce" (Case, page 63).

The court denied the motion.

AFTER VERDICT.

F. The jury, on the case being submitted to it, rendered a verdict of "guilty as charged in the indictment" (Case, pages 77–78).

The defendant then moved, in writing, in arrest of sentence and judgment (Case, page 78; see pages 12–13 for grounds of motion).

G. No formal judgment appears to have been entered upon the verdict and sentence of the court.

The foregoing statement of the case presents substantially the questions involved and the manner in which they are raised.

Specification of Errors.

The following is a specification of the errors relied upon and intended to be urged and brought up by the writ of error herein:

First.

That said court erred in the drawing, impaneling, and formation of the grand jury impaneled at San Juan, in said district, at and for the April term, 1901, of said court, at which term and by which pretended grand jury the indictment herein against said defendant was found and presented and filed in this court, and upon which indictment this defendant has been tried and convicted, and that said court further erred in overruling the objections and demurrers of defendant to the drawing, organization, and impaneling of said pretended grand jury, and further erred in refusing to hear and investigate the objections of defendant to the drawing, organization, and impaneling of said grand jury, and to the legal qualifications and competency of certain persons named by defendant in said court to sit and act as grand jurors in and for said district of Porto Rico at said term of court.

That said grand jury was illegal and its acts and proceedings in this defendant's case were null and void.

Second.

That said court erred in overruling the demurrers interposed by this defendant to the indictment filed in this cause, and to each count thereof, and by holding and deciding that the facts and allegations stated in said indictment were sufficient in fact and law to put this defendant upon his plea of

not guilty, and by overruling all defendant's objections to the sufficiency of said indictment and its counts before pleading not guilty to the same, and also upon the trial of this defendant thereon at the May term, 1901, of this court.

Third.

That said court erred upon said trial at the close of the case and evidence on the part of the United States in refusing to direct a verdict of acquittal of defendant upon the various grounds stated by said defendant upon his motion for such direction, and particularly on the ground that said indictment, nor any of its counts, did not contain any averment of the deposit and mailing of the letter mentioned therein in any post-office of the United States or place for the deposit of mail matter; nor did the second count of said indictment contain any allegation that said letter had not been delivered to the person to whom it was addressed; nor was there any evidence at the close of the case on the part of the United States that said letter had not been delivered to the person to whom it was addressed.

Fourth.

The court erred upon said trial in receiving evidence offered by the United States, to which this defendant objected, and in overruling defendant's objections thereto, and also erred in refusing to receive evidence offered by this defendant, all of which appears in the case and exceptions filed herein.

Fifth.

The court erred in rendering judgment against the defendant in said cause upon the indictment and evidence, and said judgment is contrary to the law and to the facts.

Sixth.

The court erred in this cause in exercising jurisdiction over this defendant in his trial upon said indictment and in overruling defendant's plea to the jurisdiction of said court upon the ground that there was not any power or authority in law for the holding of said court at Ponce, in said district of Porto Rico, at the time at which defendant was tried and said judgment rendered, and commencing May 13, 1901, and all its proceedings against the defendant at said alleged regular term were and are null and void (Case, pages 86, 87, 88).

And, further, there is no evidence that said letter or package No. 171 ever arrived at the Ponce post-office, nor is there any evidence in the case that the same was not received by the postmaster at San Juan.

Facts of the Case.

The defendant was appointed to the military postal service in Porto Rico by Postmaster General Smith in September, 1898. He was then twenty-six years old and lived with his parents at Lockport, New York.

He continued in such service until March 24, 1901, when, under appointment from the Postmaster General, he was appointed to Buffalo, New York, in connection with the postal service for the Pan-American Exposition (Case, pages 44, 45, 46, 47–68).

While in Porto Rico, as the exigencies of the service required, he was acting postmaster at Playa Ponce, the port of the place where this offense is alleged to have been committed, for eleven months; then acting postmaster at Coamo for five months; then acting postmaster at Arecibo for one year, and postal clerk at Ponce for thirty days (Case, page 70).

Yauco was a post-office of the United States in March, 1901. It is about thirty (30) miles west of Ponce and is connected with it by railroad and with intermediate stations and post-offices between Yauco and Ponce.

On March 23 and 24, 1901, one Rafael Delgado was the postmaster at Yauco, and his only assistant was his brother, Antonio Delgado, a boy then fifteen or sixteen years old (Case, pages 23–28).

These two were the only persons connected with the Yauco post-office. The postmaster says that Saturday afternoon of March 23, 1901, he prepared a registered letter containing money-order funds, in checks, gold, and bills, amounting to $377, and numbered it 171 and addressed it "Postmaster, San Juan" (Case, pages 23–24).

He says there were three registered packages in his office the afternoon of March 23, Nos. 169, 170, and 171, originating in Yauco, and that three others came in the morning of March 24 from the western mail (numbered presumably) 168, 605, 606 (Case, pages 28–29–26).

In his cross-examination he describes what he did, and how, and that when he finished 171 in the afternoon of March 23 and put it in the safe "I did not seal the big envelope" (Case, page 28). The "big envelope" contained the smaller one containing the checks, gold coin, and bills (Case, page 29).

This remittance letter specified four checks aggregating $150; three ten-dollar bills, six five-dollar bills, forty-two one-dollar bills, twelve ten-dollar gold pieces, and one five-dollar gold piece, bills and gold aggregating $227, and in checks, bills, and gold pieces aggregating $377.

The printed and written part of the remittance letter was wholly in English. The subscribing witness to it, one Salvador Amil, did not understand English, and the postmaster translated it to him (Case, page 32).

The train carrying the mail the morning of March 24 left Yauco at 6.45 (Case, page 28), and arrived at Ponce about 8

a. m., or a few minutes later. The mail was delivered to Janitor Stephens at the Ponce post-office about 8.15 a. m. (Case, page 33). He received the mail from Yauco from the carrier, and just then the defendant came in. Stephens opened the mail and dumped the registers on a table, and defendant took them and locked them in a box. Defendant staid in the office about ten minutes and then left (Case, pages 33–34).

Stephens never saw letter 171 (Case, page 34).

Skinner, the assistant postmaster at Ponce and registry clerk March 24, discovered that package 171 was not among the registry matter, nor in the Ponce office, about 12.30 of that day (Case, page 37).

He marked out of the card, which is a package receipt for the articles named on it, the No. 171 (Case, page 37); says he never saw registered package No. 171 (Case, page 38).

Salicrup, clerk in the Ponce office, went to the office about 11 a. m.; took registers out of box, which was locked, and staid there, off and on, until about 4 p. m.; says he never saw package 171 (Case, page 39).

The defendant in his statement to Mr. Smith, made on March 29 and being "Exhibit F" for the United States, says he went to the post-office about between 11 and 12 a. m. and got three letters there for him; that Stephens and Salicrup were then in the office (Case, page 80).

Mr. Lee, a witness for the United States, saw the defendant about 6.45 p. m., March 24; that there was some talk about money, but couldn't tell anything about the amount; that the defendant showed some money; could not say how much he had; he had some bills and some gold; that a Mr. Kahrman and Mr. Chalk were present (Case, pages 44–45).

Mr. Kahrman, a witness for the United States, testified that he saw defendant about 6 p. m., March 24, and that Lee and Chalk were present; that defendant pulled money out of his pocket and counted it out on the table; that he could not state exactly the amount, but it was about $175—somewhere near that; the money was in bills and in gold; that

he could not state how much was in gold; thought there was sixty or seventy dollars in gold, but was not quite sure (Case, pages 45–46).

That Chalk was sitting alongside defendant and could see them better than he could; that he, witness, was sitting on the opposite side of the table (Case, page 48).

Then Mr. Smith was called as a witness, a United States post-office inspector. His evidence is lengthy and will be referred to and discussed in the assignment of errors herein.

Then Isaac Goldsmith, or Goldstein, was sworn, and says: That on March 25 or 26—but don't remember the exact date—the defendant left an envelope with him to deliver to Mr. Hutton. It was not addressed, but was in blank. He delivered it to Hutton the following day. He put the envelope in the cash drawer, and the drawer was not locked, only night-times. The other people, the other employés, of the establishment had access during the day to that drawer and during every day. He is not able to say whether the envelope he gave Hutton on the next day was the identical envelope the defendant left with him (Case, page 54).

From the record it does not appear whether or not the envelope was sealed up or fastened. Mr. Hutton testified that on March 26 he received from Goldsmith an envelope which Goldsmith told him came from the defendant. It was unaddressed. It contained money—$70, as he remembers: were two ten-dollar gold pieces and the balance in bills, some five and ten dollar bills; kept the money in his possession a few days; part of it he spent, and part of it he turned over to Mr. McLeod and Mr. Landis (Case, page 55).

The witness was then permitted by the court, against the defendant's objections, to state the talks and transactions between himself and Messrs. McLeod and Landis. They will be referred to and discussed in the assignment of errors hereafter.

In the money delivered by Hutton to McLeod and Landis, being "Exhibit G" (Case, page 62), the district attorney stated

and claims that the bills in series and numbers correspond with the Yauco letter of remittance and the indictment herein.

The court will see that in part at least that is not true.

It was received in evidence under defendant's objections.

The United States district attorney was then permitted to reopen the case to show whether or not letter 171 was delivered or received at the San Juan post-office.

He called Postmaster Landis, who, being asked if he received, as postmaster at San Juan, a registered package issued from the Yauco post-office on March 23 last and numbered R. P. E. No. 171, said he could not tell. He was the only witness called and this was the only evidence on that point.

The United States then again closed its case (Case, pages 64–65).

The defendant than gave some evidence as to where he was and what he did on March 24 (Case, pages 68 to 69).

Among others he called W. P. Chalk, the person before spoken of. He was with defendant from about 1.30 p. m. until he left Ponce on the mail coach. He was present with Lee and Kahrman and the defendant that afternoon. He does not corroborate Kahrman. That he spent some time with the defendant on Saturday evening, March 23, and that some gold was changed, but he did not know how much.

The defendant called William Houghtaling, clerk in the auditor's office for the island of Porto Rico for two years. Knew the defendant since July, 1898. Stated positions defendant had held in postal service while in Porto Rico. The defendant offered to show that about $200,000 had been received, disbursed, and accounted for in such position without a cent's loss or discrepancy, and that all his reports as such official were regularly and promptly made.

The court excluded the money part of the offer (Case, pages 69–71).

That he had known defendant's reputation since July, 1899; that for integrity, from the speech of people on the island, it was good.

The defendant then recalled Mr. Miller, postmaster at Ponce, who had known the defendant since June 8, 1899; knew his reputation for honesty and integrity in Ponce, from the speech of people, and it was good (Case, page 70).

The defendant was then sworn as a witness in his own behalf (Case, pages 70–71).

Says he never saw the package in question and did not take it; states how long he has been in the postal service, and where and in what capacity.

The statements, "Exhibits E & F," which the defendant made at Mr. Smith's request, were put in evidence by the United States attorney (Case, pages 80–83).

First Assignment of Error.

First.

That said court erred in the drawing, impaneling, and formation of the grand jury impaneled at said court at San Juan, in said district, at and for the April term, 1901, at which term and by which pretended grand jury the indictment herein against said defendant was found and presented and filed in said court, and upon which indictment this defendant has been tried and convicted, and that said court further erred in overruling the pleas, objections, and demurrers of defendant to the drawing, organization, and impaneling of said pretended grand jury, and further erred in refusing to hear and investigate the objections of defendant to the drawing, organization, and impaneling of said grand jury, and to the legal qualifications and competency of certain persons named by the defendant in his plea in abatement in said court to sit and act as grand jurors in and for said district of Porto Rico at said term of court.

That said grand jury was illegal and its acts and proceedings in this defendant's case were null and void.

The defendant pleaded in abatement to said indictment, and the United States attorney demurred to said plea (Case, pages 3, 4, 5, 6).

Under the general rules governing pleadings, a demurrer interposed to the plea in abatement admits the allegations in such plea to be facts. It was therefore not necessary to offer to prove the truth of the facts alleged in said plea. Under the decision of the court sustaining the demurrer, the judge would not have heard them.

The question then arises, was the plea sufficient in form and substance, and were the allegations thereof, in case the demurrer was overruled and an answer interposed, and the facts admitted by the demurrer proven, such as to disqualify the persons therein named from sitting and acting as grand jurors?

If these questions are answered in the affirmative, then the indictment herein is void and of no effect.

First. The plea specifically names such disqualified persons.

Second. It states the grounds of such disqualifications.

Third. It states how the additional persons were summoned.

Fourth. It states the legal qualifications of jurors under the act of the Legislative Assembly of Porto Rico.

Fifth. It states those summoned who were not publicly drawn from the box containing names as required by the act of the Congress of the United States, dated June 30, 1879, and that the names of such jurors were not in such box.

Sixth. That no writs of *venire facias* were directed as to said last-named persons from the clerk's office of said district

court, or by his deputy, nor returned in the manner prescribed by section 803 of the Revised Statutes of the United States.

Seventh. That he, the defendant, was not present in court at the time of the selection, summoning, and impaneling of said jury and had no opportunity to make any challenge to the same, or to the members thereof, because he did not know of said action and was not at that time represented by counsel, but had that day (April 13, 1901) learned of the aforesaid acts for the first time, and therefore immediately presented said plea; that said plea, in substance, alleged that he had been and would be greatly prejudiced by such illegal and improper selection and impaneling of such grand jury, as it was composed, as aforesaid, of persons so as aforesaid disqualified to act, and it concludes with a prayer, praying judgment that the said indictment be dismissed and quashed.

Eighth. It was duly verified.

As before stated, by the ruling of the court the defendant was prevented from giving or making evidence of the allegations of his plea, but the demurrer admits such allegations to be facts, and it is therefore unnecessary to consider what the practice or procedure should have been in case the demurrer was overruled and an answer interposed and evidence taken as to the truth of such allegations.

The plea was, in substance, in proper form and sufficient on its face.

The only grounds of demurrer were:

First. That the plea set forth matters immaterial to the validity of the indictment.

Second. That the matters set forth, even if true, constitute no reason why defendant should not be required to plead in bar thereof.

Third. That the matters set forth, in so far as the same control or are applicable to the procedure of this court in the summoning and impaneling of a grand jury, show no illegality therein.

Fourth. Because of other good and sufficient reasons apparent on the face of said plea.

The judge in his order, opinion, or judgment held:

ORDER.

"The plea in abatement questions the regularity of the organization of the grand jury that found the indictment.

Of the twenty persons drawn and summoned, twelve appeared and were, as shown by the record, placed in the box in making up the necessary panel of sixteen, and as four were lacking, the court directed the marshal to summon four persons from the body of the district to supply the deficiency, and the marshal presented four men and they were placed in the box with the other twelve, making the required number.

It was not required, in my opinion, that names should be drawn from the jury-box to supply this deficiency. To thus construe the law would render it burdensome, expensive and impracticable, and it is evident this was not the legislative intent.

United States *vs.* Eagan, 30th Fed. Rep., 608.

The jury law recently enacted by the Legislative Assembly of Porto Rico appears to make no provisions for a grand jury; but in any event it did not take effect until April 1, 1901, and the record shows the venire of grand jurymen for this term was executed and they summoned prior to that date.

Moreover, the court is by no means satisfied that that law admits of application to the proceedings of this court.

Mere irregularities in the formation of a grand jury do not invalidate its action, but there seems to have been none in this instance. The persons composing the grand jury were examined touching their qualifications and were qualified according to the rule prescribed by this court.

The demurrer to the plea is sustained and the plea overruled."

Had the defendant not interposed his plea in abatement, but pleaded "not guilty" only, he could not have saved his rights.

The defects set forth in the plea did not appear on the face of the indictment, and a plea in abatement was the only way of raising and presenting such defects.

The facts were extrinsic to the indictment or record.

It was necessary to plead in abatement, because a plea in bar would estop the defendant by an issue. The proper time to plead in abatement is before a plea in bar or "not guilty."

This rule is well settled in England and the United States.

Chitty's Criminal Law, pages 445, 446, 447.

If a grand juror is disqualified, he may be challenged by the defendant before the bill is presented, and if it be discovered after the finding, the defendant may plead it in avoidance (*Ib.*, page 307).

The plea, under the English practice, should be verified by affidavit that it is true (*Ib.*, page 448), and should pray for judgment (*Ib.*, page 448).

The plea in this case was verified, and demanded judgment that the indictment be dismissed and quashed.

The objection that unqualified persons were placed upon the grand jury by which the indictment was found may be raised by the defendant by a plea in abatement. The sufficiency of such plea in the Federal courts, in the absence of

legislation by Congress, must be decided by the principles of the common law.

United States *vs.* Williams, 1 Dillon, 485.
See also United States *vs.* Hammond, 2 Woods, 197; S. P., 1878.
United States *vs.* Reeves, 3 Woods, 199.

Prejudice to the defendant must be alleged.
United States *vs.* Turka, 14 Blatchford, 5.

The summoning and impaneling of the lacking persons to constitute the requisite number to form a legal grand jury was not done as required by the act of Congress of June 30, 1879 (21 Stat. L., 43), nor even as required by rule 37 of said United States district court of Porto Rico.

The reason assigned by Judge Holt in his opinion and order sustaining said demurrer, to wit, that the act of the Legislative Assembly of Porto Rico did not take effect until April 1, 1901, is without merit.

The act was in effect when said grand jury was formed, on April 8, 1901, and also when said lacking persons were placed on said grand jury, and when said indictment was presented, on April 10, 1901, and when said plea was interposed, on April 13, 1901. The act of Congress of June 30, 1879, and sections of the United States Revised Statutes relating to grand juries and grand jurors were in force.

The case of The United States *vs.* Egan, 30 Fed. R., 608, cited by Judge Holt as authority for his action, was a case arising in the circuit court, E. D. Missouri, in 1887, and simply holds:

That there being no Federal statute regulating challenges to grand jurors, the Federal courts may, under the Revised Statutes of the United States, section 722, follow the practice of the courts of the State in which they are held, with reference to the objections to indictments presented by a grand jury on the ground of irregularity in the method of selecting

the members of the grand jury. That the statutes of Missouri being merely directory, objections to the manner of drawing the members of the grand jury cannot be raised by a plea in abatement to an indictment presented by it, when it appears that the jurors irregularly chosen were competent and qualified jurors, residing in the district, and that the only irregularity consisted in the method of selecting them.

The plea in abatement in that case affected only the regularity in drawing the grand jurors, and was not one affecting the qualifications of the jurors.

The judge may be strictly accurate when he states that the marshal was directed to summon four men to supply the deficiency, and said marshal presented four men and they were placed in the box from the body of the district; but in fact the marshal went out of the court-room into the city of San Juan and returned in a few minutes bringing in three of the persons named in said plea, Frank Antonsanti, Hugo Stern, and William Bowen, and then, one more being lacking, the marshal placed W. H. Holt, Jr. (the judge's son), in the box, he being at the time a bystander in said court.

Section 800 of the Revised Statutes of the United States empowers the United States courts, by rule or order, to conform the designation and empaneling of juries in substance to the laws and usages relating to jurors in the State courts.

By section 808 of the United States Revised Statutes, hereinafter quoted, it is, among other things, provided:

"And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order (that is from the body of the district and not from the bystanders) to the marshal to summon a sufficient number of jurors for that purpose."

The judge further states in his opinion and order that "the persons composing the grand jury were examined

touching their qualifications and were qualified according to the rules prescribed by this court" (being rule 38).

It is respectfully submitted that there is no law of Congress or of the Legislative Assembly of Porto Rico giving said judge the right to prescribe by rule the qualifications of grand jurors or petit jurors.

The laws of Congress relating to grand and petit jurors to serve in the courts of the United States, in each State respectively, their qualifications, how summoned, designated, formed of how many to consist, etc., are contained in the following sections of the Revised Statutes of the United States and the act of June 30, 1879 (21 Stat. L., 43):

"SECTION 800. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State court, so far as such may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the State courts, from time to time in force in such States."

"SECTION 803. Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ."

"SECTION 808. Every grand jury empaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned, less than sixteen attend they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."

Chitty's Cr. L., 250, original paging 305.

2 Black., 301, *et seq.*

"SECTION 812. No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge."

"SECTION 2. That the *per diem* pay of each juror, grand or petit, in any court of the United States, shall be two dollars:

And that the last clause of section eight hundred of the Revised Statutes of the United States, which refers to the State of Pennsylvania, and sections eight hundred and one, eight hundred and twenty, and eight hundred and twenty-one of the Revised Statutes of the United States, are hereby repealed.

And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed

therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which said court is held, and a well known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein.

But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State;

And no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith;

Provided, That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude."

Act June 30, 1879, 21 Stat. L., 43.

See also sections of the United States Revised Statutes, 809, 810, 811.

The island of Porto Rico was ceded by Spain to the United States by the treaty of Paris, ratified and proclaimed April 11, 1899.

By the last clause of article 9 of that treaty it is provided that—

"The civil rights and political status of the native inhabitants of the territory hereby ceded to the United States shall be determined by the Congress."

Pursuant to this power Congress, by the so-called Foraker act, approved April 12, 1900, and to take effect May 1, 1900, entitled, "An act temporarily to provide revenues and a civil government for Porto Rico and for other purposes," the provisions of which, so far as they may relate to the case at bar, provided as follows:

By section 7, that the inhabitants of Porto Rico, specified in that section—

"Shall continue a body politic under the name of the people of Porto Rico, with governmental powers as heretofore conferred, and with power to sue and be sued as such."

By section 8:

"That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States:" * * *

By sections 14, 15, and 16.

"SECTION 14. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico."

"SECTION 15. That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may from time to time see fit."

"SECTION 16. That all judicial process shall rule in the name of 'United States of America, *ss:* The President of the United States,' and all criminal or penal prosecutions in the local courts shall be conducted in the name and by the authority of 'The People of Porto Rico;' and all officials authorized by this act shall before entering upon the duties of their respective offices take an oath to support the Constitution of the United States and the laws of Porto Rico."

By section 27:

"SECTION 27. That all local legislative powers hereby granted shall be vested in a Legislative Assembly which shall consist of two houses: one the executive council, as hereinbefore constituted, and the other a house of delegates, to consist of thirty-five members elected biennially by the qualified voters as hereinafter provided; and the two houses thus constituted shall be designated 'The Legislative Assembly of Porto Rico.'"

"SECTION 34. That Porto Rico shall constitute a judicial district to be called 'The district of Porto Rico.' The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years unless sooner removed by the President. The district court for said district shall be called the district court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, an interpreter, and such commissioners as may be necessary, who shall have like power and duties as are exercised and performed by commissioners of the circuit courts of the United States, and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court. The laws of the United States relating to appeals, writs of error and cer-

tiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said court shall be held at San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and special terms may be held at Mayaguez at such other stated times as such judge may deem expedient. All pleadings and proceedings in said court shall be conducted in the English language.

The United States district court hereby established shall be the successor to the United States provisional court established by general orders, numbered eighty-eight, promulgated by Brigadier General Davis, United States Volunteers, and shall take possession of all records of that court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued.

"SECTION 35. That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the district and circuit courts of the United States. All such proceedings in the Supreme Court of the United States shall be conducted in the English language."

The Legislative Assembly of Porto Rico, by act approved January 31, 1901, and which went into effect April 1, 1901, and entitled "An act concerning procedure in jury trials," and containing one hundred and sixty (160) sections, legislated concerning the qualifications of jurors in the territorial courts of the island.

The only sections of the act touching the case at bar are sections one, two, three, and four (1, 2, 3, and 4), which read as follows:

SECTION 1. A jury is a body of men selected from the citizens of a particular district, and invested with power to try questions of fact.

SECTION 2. A jury shall consist of twelve men who must unanimously concur in any verdict rendered.

QUALIFICATIONS OF JURORS.

SECTION 3. A person is competent to act as a juror if he be:

1. A male citizen of the United States or of Porto Rico of the age of twenty-one and not more than sixty years, who shall have been a resident of the island one year and of the district or county ninety days before being selected and returned.

2. In possession of his natural faculties and of ordinary intelligence and not decrepit.

3. Possessed of sufficient knowledge of the Spanish language.

4. Assessed on the last assessment-roll of the district or county on property of the value of at least two hundred dollars belonging to him.

SECTION 4. A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section, or

2. Who has been convicted of malfeasance of office or any felony or other high crime."

The act also provides for selecting, drawing, summoning, and challenging persons selected under its provisions.

The alleged grand jury in this case consisted of only sixteen persons, all told.

If any one of the sixteen was disqualified, then the indictment is void.

This was so at common law. An alien is not competent as a grand juror in Porto Rico, and was not and is not competent at common law.

"It is perfectly clear that all persons serving upon the grand inquest must be good and lawful men; by which it is intended, that they must be liege subjects of the king, and neither aliens (?); nor persons outlawed even in a civil action (?); attainted of any treason or felony; or convicted of any species of *crimen falsi*, as conspiracy or perjury, which may render them infamous (?). And if a man who lies under any of these disqualifications be returned, he may be challenged by the prisoner before the bill is presented (M); or, if it be discovered after the finding, the defendant may plead it in avoidance, and answer over to the felony; for which last purpose he may be allowed the assistance of counsel, on producing in court the record of the outlawry, attainder, or conviction, on which the incompetence of the juryman rests (A). This necessity for the grand inquest to consist of men free from all objections existed at common law, and was affirmed by the Statute 11 Hen. IV, c. 9, which enacts, that any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect whatsoever."

1 Chitty's Cr. Law, original page 307.

Under section 1 of the legislative act aforesaid, the persons selected for juries must be drawn from the "citizens" of said district.

So also section 4 requires jurors to be "citizens" of the United States or of Porto Rico.

The plea in abatement alleges that "Manuel Andino" was one of said sixteen grand jurors, and that he "was at the time * * * a citizen of the Republic of Venezuela" (Case, page 4).

If so, he was disqualified and the indictment is void.

That William H. Holt, Jr., had not at that time been a resident of Porto Rico for one year.

That Antonio Blanco, Manuel Andino (an alleged alien), Miguel Olmedo, Charles H. Post, Frank Antonsanti (alias Frank Santo, alias Antonio Santi), W. H. Holt, Jr., and William Bowen were not, nor was any one of them, assessed on the last assessment-roll of the district, county, or island of Porto Rico, on property of the value at least of two hundred dollars ($200).

That the four talesmen so drawn and serving on said alleged grand jury were not, nor was any one of them, publicly drawn from the box, containing at the time of drawing 300 names possessing the qualifications prescribed in section 800 of the United States Revised Statutes, and which names had not been placed therein by the clerk of the United States district court and a jury commissioner, as prescribed by the aforesaid act of June 30, 1879, and that no writs of *venire facias* were directed by the clerk against such persons nor returned as prescribed by section 803 of the United States Revised Statutes.

This territorial act contains the only provisions of territorial law of the island of Porto Rico defining the qualifications of jurors.

Prior to the cession of the island by Spain to the United States there was no law defining the qualifications of or relating to grand juries or grand jurors in the island.

Does this act relate to and prescribe the qualifications of grand jurors?

If not, then the only provisions of law in existence in the island on that subject and relating to grand juries and grand jurors in the United States district court are contained in

the provisions of the sections of the United States Revised Statutes hereinbefore cited and the act of Congress passed June 30, 1879.

Article V of the amendments to the Constitution of the United States provides that—

"No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury."

Felony, with which the defendant is charged, is an "infamous crime;" so, to put a person on trial in the courts of the United States for an infamous crime, there must be an indictment by a grand jury found against him.

This applies to all courts of the United States within the territorial limits of the United States.

The Foraker act is silent as to grand juries and the qualifications of grand jurors except so far as said section 14 and its other sections may refer to and extend to grand juries and jurors in the United States district court for Porto Rico.

There is nothing in the said Porto Rican act which in express terms refers to grand juries.

Section 14 of the Foraker act, however, which provides that statutory laws of the United States shall have the same force and effect "in Porto Rico as in the United States," subject to the limitations therein specified, in my opinion extends such statutory laws relating to grand juries and grand jurors to Porto Rico.

Territorial courts are the creations of the Congress, and power to create such courts is vested in Congress, and is found in subdivision 9 of section 8 of article 1 of the Constitution of the United States, which reads:

"SECTION 8. The Congress shall have power * * * to constitute tribunals inferior to the Supreme Court."

And in subdivision 2 of section 3 of article 4, which reads:

"The Congress shall have power to dispose of and make

all needful rules and regulations respecting the territory or other property belonging to the United States."

This court has repeatedly held that the territories in respect to the powers to create such courts are not within section 1, article 3, of the Constitution, which reads:

"The judicial powers of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior, etc."

Downes *vs.* Bidwell, 182 U. S., 244–270.

I know of no law of Porto Rico which provides for a grand jury.

The aforesaid act of the Legislative Assembly is the only law of Porto Rico defining the qualifications of jurors. If the qualifications of jurors therein prescribed do not apply to grand jurors, then we are thrown back upon the common law, the Constitution of the United States, and the sections of the United States Revised Statutes relating to grand juries and grand jurors, and said act of Congress of June 30, 1879, hereinbefore cited, so far as the same are applicable to Porto Rico under section 14 and the other sections of said Foraker act.

The qualifications of grand and petit jurors in the courts of the United States and in territorial courts created by Congress are prescribed in sections 800–812 and section 2 of the act of June 30, 1879 (21 Stat. L., 43).

I assume, also, that in accordance with the common law (Congress or the State or territorial law being silent) such jurors must be male citizens of the United States.

That an alien is disqualified.

That they must be inhabitants and residents of the district, county, State, or Territory for which they inquire.

That they must be of good character.

By the common law grand jurors must:

1. Be male subjects of Great Britain.

2. An alien was not qualified.

3. Must be of good character.

4. Must possess property qualifications.

5. Must be inhabitants of county for which they are sworn to inquire.

6. Must be twenty-one years of age.

1 Chitty's Cr. Law, original pages 305 to 310.

If Porto Rico has failed to provide for grand juries and the qualifications of grand jurors, and the sections of the United States Revised Statutes and the act of June 30, 1879, before cited, do not provide for the same, then under the fifth amendment to the Constitution of the United States, imperatively requiring an indictment by a grand jury for capital or infamous crimes committed within the territorial limits of the United States, has not the defendant been deprived of his liberty "without due process of law," required by section 1 of article 14 of the Constitution of the United States?

That reads:

" * * * nor shall any State deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

This court has held in Simon *vs.* Croft, 182 U. S., page 427, that—

"The essential elements of due process of law are notice and opportunity to defend."

But in the above condition the question arises, was there any process of law in defendant's case?

Was there any grand jury, any indictment; and did he, in his pretended trial, have any day in a legal term of court?

Further, as to pleas in abatement see:

Tarrance *vs.* Florida, 188 U. S., 519.
Smith *vs.* Mississippi, 162 U. S., 592.
Brownfield *vs.* South Carolina, 189 U. S., 427.
Clinton *vs.* Engelbrecht, 13 Wall., 437.

Second Assignment of Error.

"That said court erred in overruling the demurrers interposed by this defendant to the indictment filed in this cause, and to each count thereof, and by holding and deciding that the facts and allegations stated in said indictment were sufficient in fact and law to put this defendant upon his plea of not guilty, and by overruling all defendant's objections to the sufficiency of said indictment and its counts before pleading not guilty to the same, and also upon the trial of this defendant therein, at the May term, 1901, of this court."

The indictment contains three (3) counts.

Preceding the first count is a caption, which reads as follows:

"At a stated term of the district court of the United States within and for the district of Porto Rico begun and held in the court room of said court at the city of San Juan in said district on the second Monday in April being also the 8th day of the month, in the year of our Lord 1901 and in the 126th year of the Independence of the United States of America.

On the 10th day of said month and year, came the grand jury and returned a certain indictment which was filed and is as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Porto Rico, }

In the District Court of the United States in and for the District Aforesaid, at the April Term Thereof, A. D. 1901."

A. It does not appear in the caption that the indictment was taken and found upon oath.

This should so appear.

1 Chitty's Cr. L., 267.

That count alleges that the defendant, March 24, 1901, was a person employed in a department of the postal service of the United States, to wit, a clerk in and for the post-office of the said United States at Ponce, within said district, and that a certain letter then directed and intended to be conveyed by mail to the postmaster of the United States at San Juan had then and there come into the defendant's possession as such clerk, and which letter contained gold coins, bank notes, United States notes, and bank checks amounting to $377, money and property of the United States, and that the defendant, then and there being so employed, did steal and take said contents to the value of $277 out of said letter, which letter had not then been delivered to said person to whom the same was directed.

B. This count does not state when such letter was mailed or deposited.

C. It does not state by whom it was mailed, nor where.

D. It does not allege that the letter was ever actually deposited in the mail, or in any post-office for mailing and delivery.

E. It does not describe the gold coin, bank notes, United States notes, and bank checks, or any one or more of them,

and an acquittal or conviction under it could not be pleaded in bar in another prosecution for want of certainty or lack of description of the articles alleged to have been taken out of said letter.

The Second Count of the indictment is open to all the objections stated against the first count except as to the description of certain of the bills alleged to have been in said letter, and is also further objected to as follows:

It does not appear on its face that it was found and presented upon oath, nor does it refer to the first or other counts to supply this omission.

In First Chitty Criminal Law, page 205, the doctrine on this point is held.

"The introduction of several counts, therefore, which merely describe the same transaction in different ways cannot be made the subject of objection for the defendant can either demur, apply to the court to relieve him or move in arrest of judgment.

It seems also to follow from these principles that every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses, that the joinder of counts is admitted; and to the supposed second or third offense in each count should be prefixed a statement that the jury *super sacramentum suum ulterius præsentant.*"

Each of the three counts of the indictment is separately signed by the district attorney (Case, pages 1, 2, 3).

The second count appears to be based upon section 5467 of the United States Revised Statutes, which section relates to the secreting, embezzling, or destroying any letter which contains any of the articles enumerated in said section, and also to the stealing or taking any of such enumerated articles out of such letter, and provided the same shall not have been delivered to the party to whom it is directed, and

the punishment is imprisonment at hard labor for not less than one year nor more than five years.

The first part of the section relates only to the letter, while the latter part of the section relates to stealing the contents of such letter.

On the back of the indictment is the endorsement that the indictment is for "Violation of sec. 5467, R. S., etc." (Case, page 3).

In the commitment of defendant after conviction it appears as follows: "The defendant Harold Crowley, having been tried and found guilty as charged in said indictment for embezzlement a violation of section 5467 of the Revised Statutes of the United States" (Case, page 11).

From the endorsement on the indictment and in the order of commitment, from the language of this count and from the sentence, it may be said that the indictment is founded on an alleged violation of section 5467.

If so, that count is fatally defective because of the omission therefrom of the statutory words and statutory requirement, to wit:

"And provided the same shall not have been delivered to the party to whom it is directed."

In an indictment under that section it is absolutely necessary to allege that fact and also to prove it.

Where the offense is statutory the language of the statute must be followed in words or in substance.

The Third Count cannot have been drawn under section 3891 for two reasons: That section does not, in terms at least, refer to persons in the postal service, nor does it require that the letter shall not have been delivered to the party to whom it is directed.

This third count contains both these allegations, to wit: clerk in postal service, and that the letter had not been delivered, etc.

Nor can it have been drawn under section 5469, which relates to persons not in the postal service.

It is defective in this:

It does not allege depositing and mailing in any post-office or branch post-office "established by authority of the Postmaster General, or in any other authorized depository for mail matter, or in charge of any postmaster, assistant clerk, carrier, agent, or messenger employed in any department of the postal service, shall be evidence that the same was 'intended to be conveyed by mail' within the meaning of the two preceding sections," nor the time of mailing.

It does not describe the money and other articles of value therein alleged to be contained nor the ownership thereof.

It does not give the date of such letter nor by whom written; only that it was sent by one Rafael Delgado.

It is vague and indefinite.

For the foregoing reasons it is submitted that the district court erred in overruling the demurrers interposed by the defendant to the indictment herein and to each count thereof.

Section 1025 of the United States Revised Statutes does not help the United States in this case.

That section provides that no indictment found and presented by a grand jury in any district or circuit court of the United States shall be deemed insufficient, nor shall the trial judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Here the objections to the indictment were not to defect or matter of form.

They were for the omission of necessary and material allegations, as stated in the foregoing objections.

THIRD ASSIGNMENT OF ERROR.

That said court erred upon said trial at the close of the case and evidence on the part of the United States in refusing to direct a verdict of acquittal of defendant upon the various grounds stated by said defendant upon his motion for such direction, and particularly on the ground that said indictment, nor any of its counts, did not contain any averment of the deposit and mailing of the letter mentioned therein in any post-office of the United States or place for the deposit of mail matter, nor did the second count of said indictment contain any allegation that said letter had not been delivered to the person to whom it was addressed, nor was there any evidence at the close of the case on the part of the United States that said letter had not been delivered to the person to whom it was addressed.

At the close of the evidence on the part of the United States, the court should have granted defendant's motion to direct a verdict of acquittal.

Two of the assigned grounds for such motion alone were sufficient.

That the second count is fatally defective in that it does not allege that it was presented upon the oaths of any grand jury, and further that it does not allege that the letter therein mentioned had not been delivered to the party to whom it was directed.

Further, there is no evidence in the case that this letter or package was not delivered to the postmaster at San Juan (Case, page 63).

Then the district attorney asked the court to permit him to reopen the case on the part of the United States to show whether or not the letter was ever delivered to the postmaster at San Juan.

The court permitted him to do so, and he recalled Mr. Landis, then postmaster at San Juan, and before and since

March, 1901, and failed to show by him whether or not the letter had been delivered at the post-office at San Juan. The postmaster stated why he could not tell or answer the question.

No one else was called on that point, although others might have been called (Case, pages 64–65).

The United States then rested its case, and that fact remained unproven (Case, page 65).

The failure and refusal of the court to grant defendant's motion on the stated grounds was error.

The requirement of omitted allegation was statutory, and its allegation in the indictment absolutely necessary, and its proof was indispensable.

Without its establishment, the case of the United States was not made out, and there was nothing to put the defendant on his defense.

There was no evidence whatever on this point.

Fourth Assignment of Error.

The court erred upon said trial in receiving evidence offered by the United States to which this defendant objected and in overruling defendant's objections thereto, and also erred in refusing to receive evidence offered by this defendant, all of which appears in the case and exceptions filed therein.

The evidence of the United States witnesses, McLeod and Mr. Landis, was in part improper and incompetent. To understand this it is necessary to refer to the evidence of Mr. Smith. He testifies:

"I asked him (the defendant) what was the package he had left for Mr. Hutton the night he and I left for Ponce. He said, 'A note and money.' I asked him if Mr. Hutton had returned it to him and he said, No. I asked him then if he would object to going to Mr. Hutton in my presence

and asking him for that money, and he said he would go. I said: No. I think I had better not go. I will send for it. I said later: 'You sit down at the desk and write a note to Mr. Hutton asking him to send that money you left with him by bearer. He said, Certainly, and he sat down at the desk and wrote the note and signed it. I handed it to my clerk, Mr. McLeod, and told him to go to Mr. W. K. Landis, postmaster of San Juan, and ask him to go with him as a witness to Mr. Hutton as to the receipt of the money from Mr. Hutton, also to witness the money that Mr. Hutton gave him was the identical money which he was bringing to me. He went out and returned in about twenty minutes. Mr. Crowley remained there and Mr. McLeod returned with Mr. Landis. Mr. McLeod had a bundle of bills in his hands which he threw on my desk and I spread them out on the desk."

McLeod testified as follows:

John D. McLeod, called by the United States and sworn, testified:

My name is John D. McLeod. I am clerk in the office of the post-office inspector, San Juan. The chief inspector is Mr. Lawrence Letherman. The field inspector is Mr. A. A. Smith. I know Harold Crowley, the defendant. On March 28th last I was in the office at the same time that Crowley was. I was requested by Mr. Crowley to take a note to Mr. Hutton and to get some money that he asked for in the note. Mr. Crowley wrote the note. I could not say that I read it. I think I read part of it when he handed it to me. I did read the note. After the note had been written by instruction from Mr. Smith I asked Mr. Landis to accompany me, and I proceeded to find Mr. Hutton. We went to different places, and at last found him in a saloon on San Francisco street. I called him out and presented the note, and asked him to read it. He read the note, and as he did not seem to understand at first what was required, I took the note

from his hand and read it, and I said to him, "Mr. Crowley requests that money he left with you and wants you to give it to me and Mr. Landis." He said, "It is not here." I said, "Can you get it?" He said, "I do not think I could." I said, "Are you sure?" He said, "I might in half an hour."

Mr. DEXTER: I object to this statement as it cannot be competent. It is simply hearsay remarks made by Mr. Hutton. I object to it on the ground of its incompetency.

The COURT: This witness was the agent of the defendant sent by him to get certain things.

Mr. DEXTER: I believe that rule applies where the agent is for the purpose of obtaining information, but in this case he was sent to get a certain sum of money, and not to enter into any discussion with the party to whom he was sent.

The COURT: I think he was his agent as to that transaction. He was directed to carry out certain instructions. I will let you prove what he said.

Mr. DEXTER: Note an exception.

Witness, answering:

He said he could get it in probably a half an hour and would take it to the office. I told him that if it was just as convenient I would accompany him and he would get it there in my presence, and we then walked across the plaza to the Colonial Club restaurant and just as we went in he said to Mr. Goldsmith——

The COURT: Who said that?

Ans. Mr. Hutton said to Mr. Goldsmith: "Give me this money," and to me, "Do you want to go in and see Mr. Goldsmith?" I said: "I am not interested in Mr. Goldsmith. If you have the money I want it to take to Mr. Crowley." Just at that moment Mr. Goldstein stepped out of the door and I do not know whether it was my suggestion or Mr. Hutton's, but we stepped in and Mr. Hutton motioned to a table and we all three sat down; and as we sat down I said, "Well, are you going to get the money?" and he said, "I have it in my pocket." I said,

"How much?" and he said, "About fifty dollars." I said, "Is this the identical money left with you by Mr. Crowley?" and he said that it was. I looked at Mr. Landis to see if he understood the question and its import, and then I asked Mr. Hutton for the money and he reached in his pocket and got out a roll of bills and put them on the table and I counted out fifty dollars. I said, "Is this the original money left by Mr. Crowley with Mr. Goldsmith for you and have you any more?" and he said, "Yes, I have about four dollars more that I got in change over the bar in buying drinks." I said, "I do not want that money, but I want the original money." I told him I would give him a receipt for it and I took out a piece of paper and wrote a lead-pencil receipt. We then proceeded to the office of the post-office inspector. I carried the money in my left hand partly shut, just that way (demonstrating).

The denominations of the bills were two ten-dollar bills, one five-dollar bill and two ten-dollar gold pieces that I know of, as to the rest I cannot say. When I went back to the office I laid the money on the table in front of Mr. Smith. It was finally deposited with the postmaster of San Juan. A record was taken of the denominations of the bills; they were then placed in an envelope which was sealed with sealing wax and handed to the postmaster. The last I saw of it was the sealed envelope in the hands of the postmaster."

The witness McLeod was handed a note by Mr. Smith, written by defendant, which simply asked Mr. Hutton to give bearer some money asked for in the note.

He was not acting for the defendant.

He was acting as the agent, or rather messenger, of Mr. Smith.

His evidence of Hutton's statements, and of his own and Landis, was not competent.

The defendant had no communication with Landis before such going.

Mr. Landis' evidence was also incompetent.

He says McLeod presented Hutton a note signed by defendant, and on his cross-examination he says he was not present when defendant handed McLeod the note; that his first knowledge of the note was when McLeod showed it to him in the post-office, and asked him to go with him. "I did not know who wrote it."

The statements of McLeod, Landis, and Hutton were made out of court.

They were not made under oath. The defendant was not present. McLeod and Landis were the messengers of Smith and not of the defendant. The defendant did not send either of them to obtain information for him and had nothing to do with their selection.

The witness Landis produced a package and it was offered in evidence by the district attorney and it was received and marked "Exhibit G" under the objections of the defendant's counsel as incompetent and improper (Case, page 62).

The following is "Exhibit G" and what then and there preceded its reception in evidence:

"EXHIBIT G."

Witness produces package.

"This is the identical package that was sealed up and that remained in my custody from that time until now."

The witness opens the package.

DISTRICT ATTORNEY: I will introduce into evidence first the package entire and then the contents.

The envelope is marked "Exhibit G."

Mr. CROWLEY: The bills and the gold pieces contained in this package are objected to on the ground that they are incompetent and improper evidence in this case.

The COURT: Do the numbers of the bills, or the series, correspond in any way to the Yauco certificate?

The DISTRICT ATTORNEY: Yes, sir; both series and numbers.

The COURT: Then I think they are competent.

Mr. CROWLEY: Will your honor give me an exception?

The COURT: Certainly. Note an exception.

Said envelope and contents were thereupon received in evidence, the contents consisting of the following described articles: Two United States ten-dollar gold pieces; one United States treasury note of the denomination of ten dollars of the series of 1880 and numbered A24281565; one ten-dollar note issued by the First National Bank of Saratoga Springs, New York, of the series of 1882 and numbered U182607; one United States silver certificate of the denomination of five dollars, series of 1896, and numbered 25535872, and one five-dollar note issued by the Athol National Bank of Athol, Massachusetts, series of 1882, and numbered T817083."

The second count of the indictment describes the money as follows:

"* * * one United States silver certificate of the denomination of five dollars of the series of 1896 numbered J25535872, one United States Treasury note of the denomination of ten dollars of the series of 1880 numbered A24281565, one ten-dollar note of the First National Bank of Saratoga Springs, New York, of the series of 1882 numbered V182607E, and one five-dollar note of the Athol National Bank of Athol, Massachusetts, of the series of 1882 numbered T817083E, each article being of the value indicated upon the face thereof, twelve United States ten-dollar gold pieces each of the value of ten dollars and one United States five-dollar gold piece of the value of five dollars, * * *"

There is a variance between the notes described in the indictment and those contained in "Exhibit G," as follows:

In the second count of the indictment, which is the only count which attempted to describe the notes, the five-dollar silver certificate is described as "J25535872."

In Exhibit "G" it is described as "25535872," without any letter.

In the indictment the ten-dollar bill of the Saratoga bank is described as "V182607e."

In Exhibit "G" there is no such bill, but is one described "U182607e."

As to those two notes there is a fatal variance and their reception in evidence and submission to the jury was error.

As to the two ten-dollar gold coins contained in Exhibit "G," there was no evidence from which the court or jury could find or say that they were two of the twelve (12) ten-dollar gold coins mentioned in the letter of remittance or named in the indictment.

It was and is without sufficient or any evidence on which to base a legal presumption in a criminal trial for felony.

Therefore the reception of "Exhibit G" in gross, as offered and received, was error.

The court erred in receiving the evidence of Mr. Hutton as to what he said to McLeod and Landis. It was objected to by defendant's counsel, but inasmuch as in the examination of this witness the judge assumed in many of the questions to assist the prosecuting attorney, he sustained himself as against defendant's objections.

The witness Hutton was called by the United States attorney and was sworn as a witness for the United States.

It is not for the United States to credit and discredit in the same breath its own witness.

The following is the evidence claimed to be incompetent and objected to:

"I received an envelope from Mr. Goldsmith. It was unaddressed. It contained money to the amount of $70.00, as I remember it. I only remember there were two ten-dollar gold pieces and the balance was in bills but I do not remember the denominations of the bills. There were, however, some five and ten dollar bills. I cannot say how long I kept

the money in my possession, a few days. Part of it I spent and part of it I turned over to Mr. McLeod and Mr. Landis."

Question. How did you happen to turn that money over to those gentlemen?

Mr. CROWLEY: The question is objected to, because it is not put in shape to make it competent evidence.

The COURT: I will let him state what he did with it.

Mr. CROWLEY: Anything he did with it unless in the presence of the defendant.

The COURT: I have said that I will let him state it.

The defendant excepted.

"Mr. Landis and Mr. McLeod met me and handed me a note from Mr. Crowley asking me to turn over that money. I had often seen his handwriting. I turned it over in response to the request in that note. I turned over to them fifty dollars in fives and ten dollar bills. No gold. I could not say positively whether or not the fifty dollars was part of the seventy dollars which I received in the envelope delivered to me by Mr. Goldsmith. I rather think so but I cannot say positively.

Question. Why not?

Answer. From the fact that I might possibly have received other money and may have paid out that money I received in the envelope.

Question. Did you not, at the time you turned over that money to Mr. Landis and Mr. McLeod, state to them positively that that was fifty dollars of the seventy dollars you had received in that envelope?

Mr. CROWLEY: I object to this question unless the defendant was present.

The COURT: I think he can refresh his recollection if it was so and so.

Mr. CROWLEY: But if the defendant was not present it is incompetent and improper.

The COURT: You had better confine that to the witness' best knowledge.

Question. As a matter of fact are you not on very friendly and even intimate terms with the defendant, Harold Crowley?

Mr. DEXTER: I object to the manner of the dist. att'y. This appears to be a cross-examination. He is his witness.

The COURT: I will let him prove that.

DIST. ATT'Y: I want to ask this question because the witness, to a certain extent, is an unwilling witness.

The COURT: I have not seen sufficient evidence that the witness was unwilling.

By the COURT: From your knowledge of the transaction was that the same money?

Ans. I do not know, from the fact, as I say, I may have received other money in the interim from the time it was turned over to me by Mr. Goldsmith and the time I delivered the money to Mr. Landis.

Question. From the way you keep your money, from your best knowledge, is that the same money or a part of it?

Ans. I think, possibly, that it is a part of it.

Question. What is your best opinion about it?

Mr. CROWLEY: I object to the question of the court as to the best opinion of the witness and to the answer of the witness as to that opinion.

The COURT: I say the word "opinion" in the sense of "knowledge," Mr. Hutton. Now answer the question.

Question. From your knowledge of the circumstances and the way you keep your money and what you receive, according to your best knowledge is that the same money or a part of it?

Mr. CROWLEY: I object to the question because it calls for evidence that is incompetent, improper, and for a conclusion and not for a statement of fact.

The COURT: The witness will answer the question.

Mr. CROWLEY: Please note an exception.

WITNESS, answering: I think possibly a part of it, perhaps.

The COURT: What was your answer? Did you say you think so?

Ans. Yes, that was my answer.

The COURT: Proceed, Mr. District Attorney.

The DIST. ATT'Y:

Question. I desire to repeat my former question, your honor, on the ground that the unwillingness of the witness has been sufficiently shown.

The COURT: What was the question? Read the question.

The stenographer read the following question:

Q. Did you not at the time you turned that money over to Mr. Landis and Mr. McLeod, state to them positively that that was fifty dollars of the seventy dollars you had received in that envelope?"

Mr. CROWLEY: I desire to object to this question, as it is incompetent and improper, unless the defendant was present when such a statement was made.

The COURT: Let the witness answer the question.

Mr. CROWLEY: I desire that the record show an exception taken by us to the ruling of the court.

The COURT: Make an exception. Answer the question.

WITNESS, answering:

I told them that I thought it was. I think that was the extent to which I went in the positiveness of my statement.

Question. Didn't they ask you directly "Is this a part of the identical money that you received in the envelope from Mr. Goldsmith," and didn't you answer them, without any expression of doubt whatever, it was?

Mr. CROWLEY: I object to the question as incompetent and immaterial and for the same reason and grounds as stated in the objection to the other question and answer.

The COURT: Answer the question.

WITNESS, answering: I told them I thought it was.

Question. Didn't you tell them what I have asked you?

Ans. I did not understand your question.

Question. There is a difference, Mr. Hutton, between saying Yes "think it was the money" and "It was the money." I will repeat the question: Did they not ask you directly whether or not it was the identical money and did you not reply to them that it was the money, without any shadow of doubt about it?

Mr. CROWLEY: I object to this question as incompetent, improper, and immaterial.

The COURT: Answer the question, Mr. Hutton.

Mr. CROWLEY: Please note an exception.

WITNESS, answering: As I answered before, I said I thought it was the money. That is my recollection. That is all I can say.

The questions of the judge and of the district attorney were leading and in the nature of a cross-examination of their own witness. They called for the expression of his opinions of what he said to McLeod and Landis.

Some of the questions of the judge called for the expression of the witness' "opinion," and when objected to in that form, were explained by the judge as being asked in the sense of "knowledge," and when objected to in that form, changed to "best knowledge," and being objected to in that form, the objection was even then overruled.

The right of a judge to ask questions is not questioned, nor should a fair and impartial exercise of such right be criticised, but it is respectfully submitted that the course of the judge in this examination of Hutton went too far, and the questions asked and the answers obtained were improper and incompetent.

The reference to Hutton was not by the defendant, nor for information. The statements then made were not under oath, and were without any chance for cross-examination, and the defendant was not present.

"To admit the declarations of a third person in evidence on the ground that one party to the suit has referred the

other party to him, it is necessary that the reference should be for information relating to the matter in issue.

Allen *vs.* Killinger, 8 Wall., 480–487.

United States *vs.* Hartwell, 3 Cliff, 221.

Sixth Assignment of Error.

The court erred in this cause in exercising jurisdiction or in attempting to exercise jurisdiction over this defendant in his trial upon said indictment and in overruling defendant's plea to the jurisdiction of said court upon the ground that there was not any power or authority in law for the holding of said court at Ponce, in said district of Porto Rico, at the time at which defendant was tried and said judgment rendered and commencing May 13, 1901.

The objection was made in every possible way. It was pleaded when his case was moved for trial on May 17, 1901 (Case, pages 8 and 9), and that plea being demurred to by the United States district attorney and the demurrer sustained, and also raised again on defendant's motion for acquittal (Case, pages 63–64), and in arrest of judgment, etc.

The defendant was forced to trial.

It is respectfully submitted that the district court of the United States for the district of Porto Rico was without jurisdiction to try this defendant at its alleged May term at Ponce, commencing May 13, 1901.

The judicial district of Porto Rico and the times and places for holding terms of the United States district courts for said district is created by and derived solely and wholly from the act of the Congress of the United States entitled "An act temporarily to provide revenues and a civil government for Porto Rico and for other purposes," passed April 12, 1900, and to take effect and be in force from and after May 1, 1900.

Its creator was the Congress of the United States, and its only powers and jurisdiction as to this case are those given to it by the Congress that created it in the act above referred to.

Those powers and jurisdiction as to this case are found in sections 33 to 41, inclusive, of that act, and also in section 14 of that act hereinbefore quoted.

By section 34 of that act, hereinbefore quoted, it is provided, among other things, that—

"Regular terms of said court shall be held at San Juan commencing on the second Monday of April and October of each year, and also at Ponce on the second Monday of January of each year, and special terms may be held at Mayaguez at such other stated times as said judge may deem expedient."

The language as to holding terms of said court is imperative, "shall be held," stating the time and place.

As to special terms at Mayaguez, it is permissible, "may be held" "at such other stated times as such judge may deem expedient."

The court commencing at Ponce, May 13, 1901, assumed to be a "regular term."

Grand and petit jurors were summoned.

There was no claim that it was an "adjourned term" of any "regular term."

The judge of said court has made rules for said court and therein assumed to provide as follows:

RULE 1.

"Terms will be held at San Juan on the second Monday in April and October; at Ponce second Monday in January and May, and at Mayaguez first Monday in June and December. Special terms will be held by order if needed."

These rules went into effect September 15, 1900 (Case, page 64).

By assuming to provide for a term of said court in Ponce on the second Monday of May, by rule, the judge attempted to exercise legislative power nowhere given to him. The Congress only could do what he has assumed to do.

It is, or may be, claimed that the defendant waived his right to make this objection by reason of what appears on the records of the court held in San Juan in April, 1901, as follows:

"And afterwards, to-wit:—on the day last aforesaid, (15th day of April, 1901) further entry was made upon the journal of said court in said cause, which said entry is as follows,—

"Thereupon the court makes the following order:—

The case at the request of the defendant and the district attorney not objecting is transferred to the next term of this court at Ponce to be called on the third day of the term, and in the event that the defendant does not give bail then the marshal of this court will, at the proper time, take and transport him there for trial" (Case, page 8, also pages 63–64).

I respectfully submit that no consent of the defendant could confer jurisdiction on said court to try a defendant indicted for felony at a time and place not provided for by an act of the Congress of the United States, or at a term assumed to be fixed and called by said judge by a rule of said court, which rule he was not authorized to make by the

Congress of the United States under the act creating him or by any act of the Congress then in force.

If, by rule of the court or otherwise, he could hold a regular term of the district court, with a new grand jury and petit jury, at Ponce, in May, he could hold such terms in July or September, or indeed in any month of the year.

His will would be law and not any act of Congress.

In Thompson *vs.* Utah, 170 United States, 343–354, this court holds, quoting its decision in Hopt *vs.* Utah, 110 United States, 574:

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority (1 Bl. Com., 133). The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind (4 Bl. Com., 11). Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a pros-

ecution for felony, that he shall be personally present at the trial—that is, at every stage of the trial—when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

See also De Lima *vs.* Bidwell, 182 U. S., 174.

Under the laws of the United States relating to the judiciary, the times and places for holding courts are fixed and certain.

Where there are exceptions as to the time and place left discretionary with the judge, such exceptions are provided for by law.

By section 684 of the Revised Statutes of the United States it is provided that "the Supreme Court shall hold at the seat of Government one term annually, commencing on the second Monday of October, and such adjourned or special terms as it may find necessary for the dispatch of business," etc.

By section 658 of the Revised Statutes it is provided that:

"The regular terms of the circuit courts shall be held in each year, at the times and places following; but when any of said dates shall fall on Sunday, the term shall commence on the following day."

Then follow the places and dates for holding terms of said circuit courts in the respective circuits.

By section 572 of the Revised Statutes it is provided:

"The regular terms of the district courts shall be held at the times and places following, but when any of said dates shall fall on Sunday, the term shall commence on the following day."

Then follow the dates and places for holding said terms of said court.

Section 578 provides that district courts shall hold monthly adjournments of their regular terms for the trial of criminal cases, when their business requires it to be done, etc. Special terms may be held (section 581), and intermediate terms, and how ordered (section 586).

By section 2 of article 3 of the Constitution of the United States it is provided:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be held at such places as the Congress may by law have directed."

The enforced trial of the defendant in Ponce in May, 1901, was depriving him of his liberty "without due process of law" under section 1 of the fourteenth amendment to the Constitution of the United States.

Fifth Assignment of Errors.

The court erred in rendering judgment against the defendant in said case upon the indictment and evidence, and said judgment is contrary to law and to the facts.

The whole case, from beginning to end, is full of error; the indictment is void, and the conviction should not be permitted to stand.

The following are among the principal errors:

1. The defendant was illegally indicted, the grand jury not being legally drawn, summoned, formed, and impaneled.

The law required that it should be composed of not less than sixteen qualified persons. (See United States Revised Statutes, section 808.) It had only sixteen members (Holt's order, page 7). Judge Holt knew, if he did not know as to the others named in defendant's plea in abatement, that his son, W. H. Holt, Jr., who was one of the sixteen, had not

been a resident of the island for one year preceding April 8, 1901, when court convened at San Juan and said alleged grand jury was impaneled. This objection applies only in case one year's residence in the island was necessary.

The act of Congress providing temporarily revenues and a civil government for Porto Rico was approved April 12, 1900, and went into effect May 1, 1900. (See section 41 of said act.)

The judge could not have been appointed, confirmed, and commissioned until after said act went into effect (section 34 of act).

The court convened April 8, 1901.

The defendant was indicted April 13, 1901.

The impaneling was twenty-two (22) days and the indictment seventeen (17) days before the expiration of one year from May 1, 1900.

While the record does not show it, the judge and his son did not become residents of Porto Rico until after his appointment by the President and confirmation by the Senate.

That Manuel Andino was an alien, a citizen of Venezuela.

The judge had no power to make rule 38 prescribing the qualifications of grand and petit jurors for the United States district court.

Only Congress and the Legislative Assembly of Porto Rico could prescribe the qualifications of grand and petit jurors for the United States courts in the island of Porto Rico.

2. The overruling of defendant's demurrer to the indictment was error for the reasons hereinbefore stated; as was also the denial of the motion of defendant's counsel that the district attorney be compelled to elect upon what count of said indictment he would proceed to trial (Case, page 22).

3. The court erred in receiving the evidence of Messrs. Hutton and McLeod and Landis, which was objected to by defendant's counsel, hereinbefore stated, and for the reasons hereinbefore specified.

4. The court erred in receiving "Exhibit G" of the United States in evidence for the reasons hereinbefore stated, especially on the ground of variance between the bills and the indictment.

5. The court erred in refusing to direct a verdict of "not guilty" for the reasons stated in the request for such direction.

6. That the court was without jurisdiction, there being no law for holding said term of court at Ponce, commencing May 13, 1901.

7. The record does not show that any judgment of conviction and sentence has ever been entered in this case.

The record shows that the sentence of defendant was as follows:

"Thereupon the court sentenced Harold Crowley to 4 years' imprisonment in the penitentiary at hard labor," without naming in what penitentiary, or at what place, said sentence was to be undergone or executed (Case, page 11).

And that afterwards, when the order of commitment was made out, the penitentiary at San Juan was named.

Before sentence, and upon being asked what he had to say why sentence should not be pronounced, the defendant, by his counsel, stated reasons why sentence should not be pronounced (Case, page 11).

A new trial was moved for and denied (Case, page 12).

Motion in arrest of sentence was also made, and the grounds therefor stated, which was denied (Case, page 13).

These motions were filed afterwards on May 24, 1901.

8. It does not appear from the evidence in the case that the letter 171 was ever dispatched from the Yauco post-office, or ever reached or was received at the Ponce post-office, or came into the defendant's possession.

The only witnesses for the United States on this point

were Postmaster Delgado, of Yauco, and Salvador Amil (Case, pages 22 to 30 and 31, 31, 33).

The witness Delgado had been postmaster at Yauco since November, 1899, and was such all of March, 1901 (Case, page 22).

His only assistant in March, 1901, was his brother, Antonio Delgado, a boy fifteen or sixteen years old, and he had been such for about six months (Case, page 28).

The remittance was prepared in the afternoon of March 23 (Case, page 23).

Although Postmaster Delgado states it was sent from his office to its destination about 6.30 of the morning of March 24, it is submitted as to letter 171 being dispatched he cannot and did not know, as he was not there when it should have been dispatched.

Only his assistant was then present, as the postmaster had left his office before the train came and went which should have carried it.

The letter 171 was prepared in the afternoon of March 23 and put in the safe and alleged to have remained there until the morning of March 24 (Sunday), when his assistant took out of the safe registered matter and dispatched whatever was dispatched that morning.

The postmaster Delgado testified on the trial as follows:

"On the morning of March 24th when we took out this registered letter No. 171 from the safe it was in the same condition in which it had been placed in the safe the night before. Salvador Amil was present in the little window when it was taken out. He is the same I have spoken of as being the witness. Between six and a quarter after six we were there, Salvador Amil and myself, and we saw the enclosure of the registers in the bag and shut it up when we left the office. It must have left the office after we left, which must have been a quarter past six or after a quarter past six. It must have been 6:20 or 6:25. We were not

there when the mail left (Case, page 28). The train left at 6:45 that morning" (Case, pages 22 to 28).

His brother managed the safe when the postmaster was out or was not there. The assistant opened the safe the morning of March 24 (Case, page 29).

The postmaster continued:

"On the morning of the 24th I got up with the object of going for a walk with a girl who was there in Yauco which we had projected, and when I got up I went to the post-office and was there for a little while. I got there and stayed there a little while and then left with Salvador Amil. That was before the mail was dispatched from my office to go to the train (Case, page 29).

After closing the bags or pouches my assistant remained there writing some addresses on some empty bags. We left and he remained there alone, as he delivered the mail every day and the conductor takes it from him every day there" (Case, pages 29–30).

"Mr. Amil was in the little window when I attended to the closing of the pouches. When I arrived at the office that morning the ordinary mail had been already finished and when we arrived there my brother went to the safe and got out the registered mail which was the last thing he put in the bag. After having dispatched the letters and other things he went to the box for the registered matter.

After having put the sacks and registers in a bag and shut and locked the bag he threw it in the place where every morning the conductor gets them. There was one post-office key to that sack in the office being in a box on one of the tables of the post-office where we received the mail. A wooden box. There are some boxes there with the addresses of the letters in front, open where the letters are but it has two drawers and in one of these drawers were the keys.

These drawers have no locks."

The conductor who was assigned to the duty of carrying the mails at that time from the Yauco post-office to the train was Anselmo Rodriguez.

Anselmo Rodriguez was then sworn as a witness for the United States, and testified that he was the mail conductor on train from Yauco to Ponce; that on the morning of March 24 the postmaster at Yauco was not there when he took the mail; that his assistant was there (Case, page 30).

Took an hour and a quarter that morning to go from Yauco to Ponce (Case, page 31). (This would bring the mail to Ponce about 8 a. m.)

Salvador Amil was sworn as a witness for the United States. He was the witness to remittance letter of the postmaster at Yauco and testified:

"I went to the post-office the next day, March 24th, about six o'clock for the purpose of getting the postmaster to go for a walk which we had projected with several lady friends of ours. Then I had occasion to see how the assistant took out of the box the remittance of the previous day united with the two more and the three with a rubber band, and that with three other packages which he brought from another place. He then placed them in a bag after having made a note of something on a ticket, which I do not know much about. After putting them inside the bag he locked the bag and then immediately we left. This bag had a flat lock with a small key. It locked for itself with a spring, but the key was used to unlock it. On the afternoon of the 23rd I stayed at the office to about a quarter after four, I think. The postmaster and I left together. The assistant remained, his brother, Antonio."

He testified that he did not understand English. That the printed contents of letter of remittance were translated to him by the postmaster.

From this evidence it is apparent and indisputable that the postmaster was not present when the pouch containing

the registered matter on the morning of March 24 was sent out from his office, and that he did not know and could not know whether or not package 171 was in it, or sent out of his office in the mail that morning. His brother and assistant was the principal person in charge that morning.

He managed the safe in the postmaster's absence. He handled the keys and managed the office the evening of March 23 and the morning of March 24. He was left with all mail in his charge on the morning of March 24, after the postmaster left and before the arrival of train going through Yauco to Ponce.

This assistant was under the control of the United States and in its employ. He was the one person to prove the deposit in the post-office or mailing of package 171 from Yauco to San Juan, via Ponce.

He was not called as a witness nor his absence explained.

Under the circumstances he was indispensable.

Upon a charge of abstracting a letter from the mails, all the postmasters and clerks through whose hands the letter would pass in the regular course of business should be examined as witnesses where practicable.

United States *vs.* Whittaker, 6 McLean, 342.

Of course this is not always practicable and sometimes impossible.

The entry on the post-bill and in the letter of remittance that packet 171 was dispatched is not evidence of the transmission of such letter, for it may never have been put into the mail, or may have been stolen in its passage.

Dunlap *vs.* Munroe, 7 Cranch, 242–270, affirming 1 Cranch, Circuit Court Rep., 526.

The act of the postmaster in dating his letter March 23 and holding it for transmission until March 24 was expressly forbidden by the post-office regulations, and on the very printed blank used on that occasion, and such acts are

stamped in such regulations as generally indicating "fraudulent intention."

The postmaster is an interested witness. The moneys claimed to be in letter 171 were United States funds being sent to the general depositary, the postmaster at San Juan. The Yauco postmaster and his sureties were liable to be called on by the United States to make them good. He knew this, and hence would try to show he complied with the law and the regulations of the Post-Office Department to relieve himself, if possible.

The United States postal laws and regulations in force in March, 1901, were as follows:

A. Where remittances are made by means of currency or coins, at least one reliable witness should be present at the preparation and dispatch thereof.

B. Wherever it is convenient, remittances should be made in paper currency of the highest denominations that can be obtained; and where coin is included in a remittance it must be, if at a money-order office, enclosed in coin bags, which will be furnished upon application to the depositor. If not at a money-order office, it must be securely wrapped and enclosed in a strong envelope. Remittances are not to be delayed to secure notes of large denomination or to exchange coins for notes.

C. The notes or coins comprising the remittance must be counted by the postmaster or assistant who prepares such remittance in the presence of and also by the witness.

D. A letter must be made out in the case of postal funds on form 3044 A at offices of the first, second and third classes, and form 3044 at offices of the fourth class (see section 1110 as to form 6021 to be used for money-order funds) to accompany the remittance, in which will be given in detail a

description of the money included in such remittance, according to such form and provisions of this section.

E. The denominations of United States notes in use at present are $1, $2, $5, $10, $20, $50, $100, $500, and $1,000. When United States notes are included in a remittance, the series, the number, the "check letter," and the denomination should be given, thus:

"U. S. note: series of 1880—Z712576; letter D, $10.

The United States Treasury number will be found in the right upper corner and left lower corner of a note, except in the $50 note of the series of 1874, where the number will be found near the center of the upper portion of the note. The United States Treasury number is always preceded by a letter or character, and when by a letter it must be given thus: A789987. The "check letter" is printed in two places on every note, one on the right and on one the left, and always in black ink.

F. The denominations of gold certificates in use at present are $20, $50, $100, $500, $1,000, $5,000 and $10,000. The denominations of silver certificates are $1, $2, $5, $10, $20, $50, $100, $500, and $1,000. When certificates are included in a remittance, the series, the number, the "check letter," and the denomination should be given, thus:

"Gold certificate; Department series—C1123; letter C, $100;" or "Silver certificate; series of 1880—A1421; letter A; $20."

On the first issue of silver certificates the series was not given. The series will be found on all printed since 1880. The United States Treasury number will be found in the right upper corner and left lower corner of the certificates of all denominations. The "check letter" is printed in two places on every certificate, one on the right and one on the left, and always in black ink.

G. The denominations of Treasury notes used under the act of July 14, 1890, in use at present are $1, $2, $5, $10, $20, $50, $100, $500, and $1,000. The United States Treasury numbers and the "check letter" will be found as on the United States notes or silver certificates.

H. The denominations of national-bank notes in circulation at present are $5, $10, $20, $50, and $100. When national-bank notes are included in a remittance, the United States Treasury number, the "bank number," the name of the bank and the place where located, the charter number, the "check letter," and the denomination should be given. On national-bank notes the United States Treasury number is printed in the right upper corner. The "bank number" is in the left lower corner of the note under the picture. The charter number will be found in larger figures on the right of the center of the note and below the Treasury number. The "check letter" is printed in two places on every note, one on the right and one on the left, and always in black ink.

I. When coin is included in a remittance the denominations should be given, thus:

2 twenty-dollar gold pieces	$40.00
3 ten-dollar gold pieces	30.00
1 five-dollar gold piece	5.00
Twenty silver dollars	20.00
Ten silver dollars	10.00

J. A copy of the description of the money given in the remittance letter should be kept on the files of the office. The witness should sign the remittance letter and also the copy retained in the post-office.

K. The remittance and letter must in the presence of the witness be enclosed in a strong envelope, sealed, and then

placed in a registered package envelope, which will be carefully sealed and addressed. (See Sec. 838.) The package must also be continuously under the observation of the witness until it is placed in the pouch, and the pouch is locked and delivered to the mail carrier, or other person authorized to receive the same.

L. Where no one can be secured to witness the preparation and dispatch of a remittance, the postmaster should make a record of the fact on the remittance letter, and the copy retained in the office, giving the reasons therefor.

M. Where a postmaster fails to comply with the foregoing instructions, he must, if the money is lost, make good the amount, unless the facts of which he has neglected to provide the evidence are satisfactorily established through other sources.

9. The evidence does not show that this package 171 ever reached Ponce. Miller, the postmaster at Ponce; Stephens, Skinner, Salicrup, the defendant, and every one in the Ponce post-office except a clerk named Oppenheimer, Money-order Clerk Hodge, and the mail-carriers, the carriers not having access to the office on Sundays, were sworn as witnesses, and each testified that he never saw package 171.

Witness Skinner, at Ponce, on March 24, ran pencil through No. 171, and wrote the words "Not received" on return receipt (Case, page 71, Exhibit D").

Skinner was first to discover, at about 12.30, that it was not in the Ponce post-office (Case, page 38).

Under this evidence it cannot be fairly and legally claimed that the letter or packet 171 came into the defendant's possession at Ponce aforesaid, or that it ever reached the Ponce post-office.

Had the assistant postmaster at Yauco been called as a witness and testified that he placed packet 171 in the mail

pouch for Ponce, and that it was in the pouch when he delivered it to the mail conductor or carrier, on the train from Yauco to Ponce, then the legal presumption would arise and exist that it arrived at Ponce in due course of mail.

Under the regulations of the Post-Office Department, a registered letter is considered mailed when an outsider hands it to the postmaster and takes a receipt therefor.

This does not apply when the postmaster is transmitting Government funds by registered mail to a designated depository. In such case every step must be shown, down to putting in pouch and giving to mail-carrier, before it can be said to be in the mail and mailed.

Having it in his office and entering it on his book, putting in safe, etc., does not in such cases constitute mailing.

The defendant's guilt is presumed because on March 24, at Ponce, he had between $100 and $175 in his possession, testified to by one Kahrman—part in gold and part in bills. Kahrman's evidence is not sustained by the witness Lee, nor is he corroborated by defendant's witness Chalk. Kahrman is not a clear and reliable witness. His memory is poor. There is no evidence that it was the money which is described in the letter of remittance.

The defendant states about how much money he had when he left Ponce for San Juan. He made and swore to two statements at the request of and prepared by United States Inspector Smith.

The United States put them in evidence, being "Exhibits E and F." The United States thereby made him its witness.

There is no conflict or contradiction between those statements. There is no evidence anywhere that those statements are not true.

And it is further presumed because on March 25 or 26 he handed to one Goldstein, at San Juan, an envelope for one W. A. Hutton and which Goldstein put into a drawer open and accessible during the day and locked only during the night, and the contents of which envelope were unknown to

him, and which so remained in such open drawer, to which others had access, until the day following, when he delivered it to Mr. Hutton. It contained $65 or $70, and Mr. Hutton put the money in his pocket and mixed it and used it with other money, and on March 28, upon a written note of the defendant, he handed to Messrs. Landis and McLeod, at San Juan, $50 in money.

The money Hutton so turned over was two ten-dollar bills, two five-dollar bills, and two ten-dollar gold pieces (Case, page 60; also Case, page 62), and it was claimed that the bills are the same series and numbers as those contained in said packet 171, and the gold also.

While it does not appear in the record, the geographical fact is that the island of Porto Rico is about one hundred miles long east and west and between thirty and forty miles wide north and south; that Ponce and San Juan are connected by a winding military road about seventy-five miles long, taking about twelve hours to travel it between those places, and that passenger steamers carrying mail matter run back and forth from Ponce to San Juan in about the same time, around the coast, and also other boats run back and forth between the one and other island ports, and that there are other overland routes between Ponce and San Juan, and the island contains about one million people.

There was sufficient time and opportunities for many persons to go from Yauco or Ponce between March 24 and March 28, when Hutton handed some money to Messrs. Landis and McLeod.

From the record, it cannot be legally claimed that this defendant committed the alleged offense. If it was committed, it occurred at Yauco or some point between Yauco and Ponce.

The evidence, at most, may create a suspicion; but a person is not to be convicted of stealing merely because he cannot or does not give an account in what way or when or where he came into possession of the goods, assuming that

they or some of them are found in his possession. Possession, under some circumstances, is at least only *prima facie* evidence of guilt, but in criminal cases this is insufficient to convict.

1 Bishop's Cr. Pro., sec. 503.

In this case Hutton got an envelope from Goldstein some days after March 24, and does not swear positively that the money, in whole or in part, he handed McLeod was the money which he received from Goldstein. He says he thought some of it was.

1 Chitty's Cr. Law, 459.

Book 4, Black. Com., 359.

2 Hale's Pleas of the Crown, 289–290.

Davis *vs.* The People, 1 Parker's Cr. R., 447 (New York), 10.

There is no evidence in the record that said letter had been or had not been delivered to the postmaster at San Juan, the person to whom it was alleged to have been addressed.

Proof of this was indispensable.

The United States had it in its power to prove that letter 171 did or did not reach the San Juan post-office.

Witnesses could have been summoned from the San Juan post-office who could have told if it was or was not delivered.

Defendant's conduct was inconsistent with guilt of the crime charged.

There was no positive evidence against the defendant.

The evidence was wholly circumstantial. The two principal circumstances from which guilt could be suspected were the alleged possession by the defendant of about $175 in gold and bills, Sunday afternoon, March 24, in Ponce, according to the witness Kahrman, and that two of the bills given by Hutton to McLeod on March 28 in San Juan correspond in series, letters, and numbers with two of the bills which the postmaster at Yauco says were put into his letter

of remittance to the postmaster at San Juan, at Yauco, March 23 or 24.

This might create a suspicion against the defendant, but was insufficient to justify and sustain a conviction.

He was of good character and reputation.

The law and the nature of his employment presumed that, and two witnesses who had known him on the island longest testified to it, the postmaster at Ponce and Mr. Houghtaling, employed in the auditor's office at San Juan, to which office up to a certain period all reports of postmasters on the island of their receipts and expenditures were made.

The defendant had been on the island since September 22, 1898, to March 24, 1901.

The defendant offered to show that while he was on the island as acting postmaster he had handled and reported to the auditor of the island about $200,000 without the loss or discrepancy of a cent, and that all his reports were regularly and properly made, but the court excluded the money part of it (Case, pages 69–70).

He was acting postmaster at Playa Ponce, the port of the place this offense is alleged to have been committed, for eleven months; acting postmaster at Coamo for five months; acting postmaster at Arecibo for one year, and postal clerk at Ponce for thirty days, being sent and acting as the exigencies of the postal service, at first under military supervision, required on the island, from place to place (Case, page 70). His last service was at Ponce, ending March 24, and he was then leaving for Buffalo, New York, to take a position in the postal service there (Case, page 45).

He knew the postal regulations; knew that the printed instructions at the head of money-order remittance letters required that bills, coin, and drafts be described by postmaster remitting same, in presence of a witness if possible, telling series, letters, and numbers of all bank bills and notes

sent in remittance; knew also routine of registering and dispatching same, etc.

His conduct on March 24 and afterwards was inconsistent with guilt.

He had money of his own and was not in want of money.

With knowledge of the postal regulations, his open possession of gold and bills, and showing them, and that within a few hours after the alleged offense was alleged to have been committed, was not the act and conduct of a guilty man.

Chalk, a witness for the defense, saw gold and bills in his possession Saturday evening, March 23 (Case, page 68).

His whole conduct with Post-office Inspector Smith, at San Juan and Ponce and elsewhere, commencing March 28, was inconsistent with guilt (Case, pages 48, 49, 50, 51, 52, 53, and 54).

In the language of Smith:

"He showed every willingness to do as I desired him to do without any coercion on my part. From start to finish in this investigation, so far as I have been connected with it, he has placed himself freely and at all times at my command, entirely so.

He has always been perfectly willing to assist and coöperate with me, at all times. I do not remember, while in the carriage, of stating to Mr. Crowley that it would be better for him to do one thing or the other in this matter. He was so entirely willing to give me all the information that he possessed that I do not remember having made such a statement." (And then follows the remarkable statement and extraordinary conduct of this officer of the Government:)

"I told in my direct examination that when I came back from Yauco the next morning I called at the hotel and woke Mr. Crowley up. They gave me the number of his room downstairs and I went up alone. I rapped at the door and got no answer and I opened it and went into the room and

called him a number of times. He was sound asleep. His clothing was lying on a chair, a part of it on one chair and part of it on another, and I looked through it to see if any of those bills were in his clothing. I looked through the man's clothing while he was lying asleep there and searched his clothes and I did not find any five or ten dollar bills. I did not think it was necessary for him to invite me" (Case, pages 53–54).

I am informed that this man is yet in the postal service of the United States.

Because of the foregoing errors I respectfully ask that the indictment in this case be declared null and void; that the verdict be set aside and the sentence and judgment reversed and the defendant discharged.

RICHARD CROWLEY,
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